

Honorable Franklin D. Burgess

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT TACOMA

JEFFREY D. MILES, in his capacity as  
Personal Representative of the Estate of  
Kimberly L. Miles and as legal guardian of  
B. M., a minor, and J. Miles, a minor,

Plaintiff,

vs.

SHANGHAI ZHENHUA PORT OF  
MACHINERY CO., LTD., Chinese  
corporation, ABB LTD., a Swiss corporation,  
EVERGREEN MARINE CORP., LTD., a  
Taiwanese corporation, HEMLOCK  
EQUIPMENT, LLC, a Delaware limited  
liability company, and ISLAND EQUIPMENT,  
LLC, a Delaware limited liability company,

Defendant.

No. 08-CV-5743 FDB

**DEFENDANT ABB LTD.'S MOTION  
TO COMPEL DISCOVERY  
RESPONSES FROM PLAINTIFF**

**NOTE ON MOTION CALENDAR:  
NOVEMBER 13, 2009**

**I. RELIEF REQUESTED**

Pursuant to FRCP 37, Defendant ABB, Ltd. moves the Court to compel Plaintiff to answer certain discovery requests and produce responsive documents. This is a product liability action. Plaintiff is the personal representative of the decedent's estate and the legal

1 guardian of her minor children. Plaintiff claims the decedent died because of an alleged  
2 defect in a cargo container crane at the Port of Tacoma.

3 ABB's discovery requests ask Plaintiff to identify the alleged product defects and  
4 provide information about the minors' health care providers and schools. Plaintiff objected,  
5 claiming work product immunity, that ABB had exceeded the 25-interrogatory limit, and/or  
6 that the requested information was outside the scope of discovery. The Court should grant  
7 ABB's motion because Plaintiff's explanation of the alleged defects is not protected work  
8 product, ABB did not exceed the interrogatory limit, and the requested information is relevant  
9 to Plaintiff's claims or ABB's defenses.

## 10 II. STATEMENT OF FACTS

11 This wrongful death and product liability action arises from a fatal accident at the Port  
12 of Tacoma. (Hooks Decl., Ex. 1 at ¶¶ 10-13.) The decedent, Ms. Kimberly Miles, was a  
13 longshore worker. (*Id.* at ¶ 10.) Prior to the accident, she walked beneath a crane that was  
14 loading cargo containers onto a ship. (*Id.* at ¶ 11.) A container fell from the ship and struck  
15 Ms. Miles, killing her. (*Id.* at ¶¶ 12-13.)

16 The decedent is survived by her two minor children and ex-husband, Plaintiff Jeffrey  
17 Miles. (Hooks Decl., Ex. 1 at ¶ 1.) Mr. Miles is the personal representative of the decedent's  
18 estate and legal guardian of the minor children. (*Id.*) Plaintiff filed suit in January 2008 on  
19 behalf of the decedent's estate and the two minors. (Hooks Decl., Ex. 2.) Plaintiff's  
20 complaint asserts several causes of action, including wrongful death, survival, and loss of  
21 parental consortium. (Hooks Decl., Ex. 1 at ¶¶ 19-22.)

22 Plaintiff alleges that the crane at issue was manufactured by Defendant Shanghai  
23 Zhenhua Port Machinery, Co., Ltd. (ZPMC). (Hooks Decl., Ex. 1 at ¶ 2.) Plaintiff further

alleges that Defendant ABB, Ltd. designed and manufactured the crane's electrical and automation systems. (Id. at ¶ 3.) According to Plaintiff, the crane and its systems were not reasonably safe as designed, did not come with adequate warnings or instructions, and were not reasonably safe in construction. (Id. at ¶¶ 16-17.)

ABB issued 20 interrogatories and 18 requests for production to Plaintiff. (Hooks Decl., Ex. 3.) Plaintiff objected to several of the requests, including those regarding the alleged product defects and the minors' schools and health care providers. (Id. at pp. 7-8, 16-18, 21-23.) Counsel had a telephonic discovery conference but were unable to resolve their disagreement about Plaintiff's assertion of work product immunity, the allegedly excessive number of interrogatories, relevance, and the scope of discovery. (Hooks Decl., Exs. 4-5.)

### III. STATEMENT OF ISSUES

1. Is Plaintiff's explanation of the alleged product defects subject to work product immunity?
2. Does an interrogatory that asks for identical information about both minor children count as two interrogatories? Similarly, does this lawsuit feature not one but three plaintiffs, i.e., the decedent's estate and the two minor children, such that Defendant ABB could have issued 25 interrogatories to each plaintiff?
3. Are information and documents regarding the minors' health care providers and schools related to their loss of parental consortium claims (or ABB's defenses to this claim) and therefore within the scope of discovery?

### IV. AUTHORITY AND ARGUMENT

#### A. The Court Should Compel Plaintiff to Answer Discovery Requests Regarding the Alleged Product Defects

##### 1. Plaintiff's Explanation of the Alleged Product Defect is Not Work Product

ABB's discovery requests asked Plaintiff to explain his allegations of liability and product defect. One such request provided:

1 **INTERROGATORY NO. 9.** As to each defendant whom you claim is liable  
2 to you, state the following:

- 3 (a) All facts which support or pertain to such allegations of liability;  
4 (b) Identify all persons having knowledge of such facts; and  
5 (c) Identify all documents that support or pertain to such facts.

6 (Hooks Decl., Ex. 3 at pp. 7-9.) Plaintiff objected, asserting that Interrogatory No. 9 asked for  
7 work product and sought to have plaintiff counsel perform defense counsel's work. (Id. at pp.  
8 7-8.)

9 Subject to his objections, Plaintiff referred ABB to paragraphs 10-22 of the First  
10 Amended Complaint, identified several fact witnesses, and reserved the right to supplement  
11 his answer. (Hooks Decl., Ex. 3 at pp. 7-9.) The totality of the allegations in the complaint  
12 are that the crane malfunctioned; the crane's spreader failed to unlock; and the crane, the  
13 spreader, and the crane's electrical and automation equipment were not reasonably safe as  
14 designed, did not come with adequate warnings or instructions, and were not reasonably safe  
15 in construction. (Hooks Decl., Ex. 1 at ¶¶ 10-22.) The complaint and discovery answers shed  
16 no light on the alleged product defects.

17 Plaintiff's objections miss the mark. ABB does not seek plaintiff counsel's litigation  
18 strategy or other work product. Rather, ABB wants Plaintiff to identify the alleged product  
19 defects. ABB seeks the factual bases for Plaintiff's allegation of product defect. Plaintiff's  
20 explanation of how or why the products are defective is not work product.  
21  
22  
23

1 Work-product protection applies to the discovery of “documents and tangible things”  
 2 prepared in anticipation of litigation, whether prepared by counsel, the party, or the party’s  
 3 expert.<sup>1</sup> But the protection does not extend to underlying facts.<sup>2</sup>

4 Plaintiff, as the party asserting immunity, has the burden of establishing work-product  
 5 protection.<sup>3</sup> He has not met his burden. Nor has he produced the required privilege log to  
 6 support his claim of work product.<sup>4</sup>

7 Plaintiff’s objections lack merit. ABB is entitled to substantive answers regarding the  
 8 alleged product defects. Plaintiff filed his original complaint in January 2008. (Hooks Decl.,  
 9 Ex. 2.) He has had the last 21 months to identify the alleged defects. If Plaintiff cannot  
 10 explain the alleged defects, he should dismiss his lawsuit.

## 11 2. ABB Did Not Exceed the 25-Interrogatory Limit

12 ABB’s 20 interrogatories included three, Nos. 18-20, asking Plaintiff to describe the  
 13 “evidence, information, documents, and the basis” for his allegation that the crane’s systems  
 14

15 <sup>1</sup> FRCP 26(b)(3); accord *Admiral Ins. Co. v. United States Dist. Court for Dist. of Arizona*, 881 F.2d 1486,  
 1494 (9th Cir. 1989); *In re Firestorm* 1991, 129 Wash.2d 130, 150, 916 P.2d 411, 421 (1996).

16 <sup>2</sup> See *Hickman v. Taylor*, 329 U.S. 495, 504, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (“A party clearly cannot  
 17 refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of  
 18 his attorney.”); *Pacific Fisheries, Inc. v. United States*, 539 F.3d 1143, 1148 (9th Cir. 2008) (“But they [the  
 19 attorney work-product and deliberative process privileges] differ in important ways, not the least of which  
 20 is their treatment of factual material within documents. Factual portions of documents covered by the  
 21 deliberative process privilege must be segregated and disclosed unless they are ‘so interwoven with the  
 22 deliberative material that [they are] not [segregable].’” (quoting *United States v. Fernandez*, 231 F.3d 1240,  
 1247 (9th Cir. 2000))); *In re Savitt/Adler Litig.*, 176 F.R.D. 44, 48 (N.D. N.Y.1997) (finding that plaintiffs’  
 “work product” objections to interrogatories, which requested facts supporting plaintiffs’ contentions, were  
 improper because work product protection does not extend to facts); *Doan v. Astrue*, No. 04Cv2039, 2009  
 WL 3246776, \*3 (S.D. Cal. Oct. 6, 2009) (“Other authorities agree that factual information is discoverable  
 even when the information was obtained through the attorney’s own investigation.”); *Transit Authority of  
 River City v. Vinson*, 703 S.W.2d 482, 486 (Ky. Ct. App. 1985) (“[W]ork product immunity protects only  
 the documents themselves and not the underlying facts.”).

22 <sup>3</sup> *Lexington Ins. Co. v. Swanson*, 240 F.R.D. 662, 671 (W.D. Wash. 2007).

23 <sup>4</sup> See FRCP 26(b)(5)(A) (requiring the party that withholds otherwise discoverable information to describe  
 the nature of the “documents, communications, or tangible things,” in a manner that will enable other  
 parties to assess the claim).

1 were not safe as designed, did not come with adequate warnings or instructions, and were not  
2 reasonably safe in construction. (Hooks Decl., Ex. 3 at pp. 17-18.) Three matching requests  
3 for production, Nos. 16-18, asked Plaintiff to produce any related documents. (Id. at pp. 22-  
4 23.)

5 As before, Plaintiff claimed work product immunity. (Hooks Decl., Ex. 3. at pp. 17-  
6 18, 22-23.) He further objected that ABB exceeded the 25-interrogatory limit in FRCP  
7 33(a)(1). (Id.)

8 According to Plaintiff, several of ABB's 20 interrogatories count as two  
9 interrogatories, i.e., Nos. 4, 8, and 14-17. (Hooks Decl., Ex. 5.) By Plaintiff's count, ABB  
10 issued 26 interrogatories. Plaintiff is mistaken. He also ignores that there is no limit on the  
11 number of requests for production.

12 Interrogatories 8 and 14-17 ask for identical information about each of the decedent's  
13 children. (Hooks Decl., Ex. 3 at pp. 7, 15-17.) But this does not mean that each such request  
14 counts as two interrogatories.

15 Furthermore, this lawsuit has not one but three plaintiffs – the decedent's estate and  
16 the two minor children. Thus, ABB could have issued 25 interrogatories to the estate and 25  
17 to each minor.<sup>5</sup> Accordingly, even if ABB did issue 26 interrogatories to Plaintiff, ABB still  
18 did not exceed the limit.

19 The Court should order Plaintiff to answer ABB's discovery requests. If the Court  
20 accepts Plaintiff's argument, ABB respectfully requests leave to allow the extra  
21 interrogatories, Nos. 16-18, and that Plaintiff be compelled to answer within two weeks.

22  
23 <sup>5</sup> See FRCP 33(a)(1) (“[A] party may serve on any other party no more than 25 written interrogatories . . .”).

**B. Plaintiff Should Be Compelled To Answer Discovery Requests Regarding the Minors' Education and Health**

ABB's interrogatories, Nos. 15 and 17, ask for information regarding the minors' health care providers and schools. (Hooks Decl., Ex. 3 at pp. 16-17.) ABB's requests for production, i.e., No. 11, asked for copies of the minors' school records and transcripts. (*Id.* at p. 21.) Plaintiff objected, claiming the requested information and documents were not relevant to a claim or defense and were not reasonably calculated to lead to the discovery of admissible evidence. (*Id.* at pp. 16-17, 21) To the contrary, the requested information and documents are relevant to the minors' claims and ABB's defenses.

The minors seek damages for, among other things, loss of their mother's "love, affection, care, companionship, society, guidance, and parental consortium." (Hooks Decl., Ex. 1 at ¶ 20.) Evidence regarding these claims will likely focus on the nature of the parent-child relationship, and the effect of the decedent's death on that relationship.

Witnesses who have observed the minors may have relevant information as to the nature and closeness of the parent-child relationship. Teachers and health care providers might be in the best position to observe and evaluate the impact of the decedent's death on the minors.

Furthermore, Defendants should be allowed to discover potential friction and hostilities in the parent-child relationship prior to the decedent's death to show that the decedent and children had a poor relationship or were estranged. Similarly, Plaintiff may assert that the decedent's death has had a profound and lasting impact on the minors and has negatively impacted their grades and mental health. Thus, the school and health care records are relevant.



V. CONCLUSION

For the reasons set forth above, Defendant ABB requests that the Court grant the motion to compel.

DATED this 29th day of October, 2009.

By: 

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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.


On the date given below I caused to be served the foregoing **DEFENDANT ABB LTD.'S MOTION TO COMPEL DISCOVERY RESPONSES FROM PLAINTIFF** on the following individuals in the manner indicated:

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**SIGNED** this 29th day of October, 2009, at Seattle, Washington.

  
Laurie J. Fisher